Supreme Court, U.S.
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No. 96-23

In The Supreme Court Of The United States

OCTOBER TERM 1996

ANTHONY M. AMATO and A. MICHAEL SCOTT, SR.,

Petitioners,

v.

CITY OF RICHMOND, W.R. SHUMAN, ROBERT HOSICK, TERESA P. GOOCH, LAUREL MILLER, PHILIP MANGANO, MARTY M. TAPSCOTT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether, in a civil action pursuant to 42 U.S.C. § 1983 alleging an unlawful search by police officers, the district court properly allocated the ultimate burden of persuasion to the plaintiffs and the burden of production to the defendants when defendants asserted voluntary consent as an exception to the warrant requirement.

2. Whether this Court will grant a petition for a writ of certiorari when there are two independent, alternative grounds supporting the lower court's decision and the petitioner challenges only one of them.

3. May a district court consider on a motion for summary judgment the issue of whether a private party should be deemed an agent or instrument of the government for Fourth Amendment purposes?

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BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the United States Court of Appeals for the Fourth Circuit's unpublished, per curiam opinion in this case, Amato v. City of Richmond, No. 95-1114 (March 5, 1996). That opinion consists of three sentences and affirmed the judgment of the United States District Court in Amato v. City of Richmond, 875 F.Supp.

1124 (E.D. Va. 1994), "on the reasoning of" the district court's opinion. (Pet. App. A3). Consequently, it is the district court's opinion which must be subjected to scrutiny.[1]

STATEMENT OF THE CASE

Anthony M. Amato, a professional informant, and A. Michael Scott, a police officer employed by the Richmond Police Department, instituted separate actions against the City, its chief of police and five other police officers. The individual defendants were named in their individual and official capacities. The district court consolidated the actions for discovery and trial because they involved common issues of law and fact. [2]

To the extent relevant here, in one count of their respective complaints, Amato and Scott sought recovery under 42 U.S.C. § 1983 against four police officers for alleged violations of Amato and Scott's Fourth Amendment right against an illegal search. Their claim arose out of an allegedly non-consensual entry into the residence which they shared. The purpose of the entry and search, which occurred in the presence of Scott, was to arrest Amato pursuant to a warrant on

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[1]The district court's opinion is printed in petitioners' appendix at A6-A62. Because of numerous typographical errors and occasional omissions of substance, respondents will quote from the opinion printed at 875 F.Supp. 1124 and provide parallel cites to volume 875 of the Federal Supplement and to the appendix.

[2]Although Scott and Amato have filed their Petition for a Writ of Certiorari in this Court pro se, they were represented by counsel of their own choosing in the district court. In the court of appeals, they were represented by a law professor at the University of Richmond.

a misdemeanor trespass charge.

In a separate count, Amato and Scott asserted the illegal search claim against the same four defendants as a violation of state law.

Amato also asserted a separate claim against four officers alleging violation of his Fourth Amendment right against an unlawful arrest. That claim arose out of Amato's voluntary surrender to arrest on warrants charging trespass and extortion.

In addition, Amato and Scott filed separate counts based upon state tort law alleging intentional infliction of emotional distress. The City and its chief of police were named as defendants only in the state tort count. Four of the other officers were also named as defendants in that count.

Following discovery which included 21 depositions, all defendants moved for summary judgment on all claims. The district court granted the motions for summary judgment with respect to the counts alleging violation of petitioners' Fourth Amendment rights and corollary state law. The district court dismissed those claims with prejudice. The court denied the motions with respect to the state tort claim of intentional infliction of emotional distress, but dismissed that count without prejudice because there was no pending federal question remaining in the complaints.

Before considering the facts, the district court reviewed the standards regulating (1) the disposition of motions for summary judgment, (2) the analysis of Fourth Amendment law protecting against illegal searches, and (3) the allocation of the ultimate burden of persuasion and burden of production as

those concepts relate to civil complaints concerning allegations of Fourth Amendment violations. Amato, 875 F.Supp. at 1131-35; (Pet. App. A14-A24). The district court then analyzed the facts measured by the applicable principles of law and concluded, based upon the record, that a jury could not find in favor of petitioners . Consequently, the court entered judgment for the defendants as described above. Amato, 875 F.Supp. at 1135-52; (Pet. App. A4-A5).

With respect to the allegations of unlawful search, the court found that Scott, a police officer trained in the law of the Fourth Amendment, opened the door of the residence he shared with Amato with his own key and no threats were made or coercive actions taken to secure his consent. Amato, 875 F.Supp at 1134, 1137; (Pet. App. A 21, A29). The court also found that the facts established qualified immunity. Amato, 875 F.Supp at 1139-43; (Pet. App. A33-A41). Based on these two separate alternative grounds, the district court dismissed the illegal search claims with prejudice.

The district court also relied upon two independent bases for dismissing with prejudice Amato's unlawful arrest claim finding (1) that it was an unrelated third party (Acola) whose conduct produced the trespass charge and that Acola was not acting at the behest of a police officer, Amato, 875 F.Supp at 1148; (Pet. App. A52), and (2) that, again, the defendants had established qualified immunity. Amato, 875 F.Supp. at 1148-49; (Pet. App. A53-455).[3]

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[3]While the facts are numerous, the material facts are relatively few and the district court carefully parsed all which petitioners believed relevant. Because the case is controlled by legal principles regarding summary judgment, petitioners' occasional mischaracterizations are immaterial to the proper disposition of the petition. Respondents do note that, contrary

The court of appeals affirmed the judgment of the district court. (Pet. App. A1-A3). Subsequently, the court of appeals denied petitioners' petition for rehearing with suggestion for rehearing in banc. (Pet. App. A65-A66).

Petitioners now challenge only one of the grounds relied on by the district court in dismissing the illegal search counts. They claim there is a split in the circuits on the issue of the proper allocation of the burden of proof in civil cases involving the Fourth Amendment, but they do not challenge the district court's qualified immunity ground which, independently, supported its ruling. Petitioners' challenge to the district court's ruling on the unlawful arrest claim is unclear, but appears to be based only upon the contention that the district court erred in resolving the agency dispute on summary judgment.[4]

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to petitioners' statement that Dectective "Hosick immediately went to Acola's residence in his police car and chauffeured Acola to [Magistrate] Shannon's office" (Pet. 9) to swear out a warrant for trespass, the record is clear and Judge Payne found that "Acola and Hosick met at Police Headquarters." Amato, 875 F.Supp. at 1146; (Pet. App. A50).

[4]The questions presented by petitioners challenge the district court's rulings only on the illegal search claims and Amato's unlawful arrest claim with respect to the trespass charge. The petition does not question the district court's dismissal of Amato's unlawful arrest claim with respect to the extortion charge, dismissal of petitioners' official-capacity claims, or the dismissal without prejudice of petitioners' state tort claims for the alleged infliction of emotional distress. Accordingly, the petition does not challenge the district court's dismissal of the claims against the City, former Chief of Police Tapscott, and Detective Shuman.

REASONS FOR DENYING THE WRIT

I.
The district court's opinion applies the correct summary judgment, voluntary consent and burden of proof standards and is in harmony with all other cases addressing the voluntary consent issue.

- A -

The district court's opinion applies the correct summary judgment, voluntary consent and burden of proof standards.

Before one can assess whether the court of appeals' summary affirmance of the district court's opinion creates a conflict among the circuits, it is first necessary to understand the district court's approach to the illegal search issue before it.

After describing the factual background and the motions before the court, the district court's opinion addressed the standards regulating summary judgment. Those standards recognize that a non-movant's evidence is to be believed, the non-movant is entitled to all justifiable inferences and the moving party is entitled to summary judgment only if, upon consideration of the record as a whole, a reasonable jury could not find for the non-movant. Amato, 875 F.Supp at 1131-32; (Pet. App. A14-A17).

The court then reviewed the case law concerning unlawful search claims, including this Court's holding that warrantless searches are presumptively unreasonable, but that voluntary consent is a permissible exception. Citing

Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973), and other authority, the district court described voluntary consent adequate to justify a warrantless search as being "freely and intelligently [given] . . . and specific . . . uncontaminated by any duress or coercion, actual or implied." Amato, 875 F.Supp. at 1133; (Pet. App. A19).

With respect to the burden of proof, the district court began with the unremarkable proposition that the plaintiff in a civil case bears the ultimate burden or risk of non-persuasion on all elements of his claim. Here, however, because the plaintiffs produced evidence that the search was warrantless, the court required the defendants to offer evidence that the search was lawful, in this case the result of voluntary consent. Amato, 875 F.Supp. at 1134; (Pet. App. A21). Only if the defendants met their burden of production on the issue of voluntary consent did plaintiffs' ultimate burden or risk of non-persuasion again come into play. Id.[5]

The district court's analysis of the proper allocation of the burdens of proof on the issue of voluntary consent recognizes that

> the term burden of proof actually encompasses two separate burdens. One burden is that of producing evidence, sometimes called the burden of evidence or the burden of going forward. If the party who has the burden of producing evidence does not meet that burden,

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[5]For reasons discussed, infra, pp. 13-15, the district court's analysis of the burden of proof, while correct, was unnecessary to its ruling on the motion for summary judgment.

> the consequence is an adverse ruling on the matter at issue. The other burden is the burden of persuasion, which becomes crucial only if the parties have sustained their respective burdens of producing evidence and only when all the evidence has been introduced. . . . It is not inevitably true that the burden of production and the burden of persuasion must both fall on the same party.

W. LaFave, Search and Seizure, § 11.2(b) (1996). The district court's analysis and allocation of the burden of proof "reflects a fair accommodation of the constitutional requirements involved," Schneckloth v. Bustamonte, 412 U.S. at 229, in the consideration of voluntary consent in a § 1983 civil action.[6]

The district court then applied the controlling principles of law to all facts which petitioners believed pertinent and untimately concluded that the record did not contain evidence which would permit the jury to find in favor of petitioners. Amato, 875 F.Supp. at 1135-1139; (Pet. App. A25-A33).

- B -

There is no conflict among the circuits on the issue of defendants' burden to produce evidence that a search was consensual.

Petitioners seek to manufacture a conflict among the circuits where none exists. They do so by taking out of context

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[6]See also I. Silver, Police Civil Liability, § 8.06[5][d][i][B] (1996) ("Although a warrantless search is presumptively unreasonable, this presumption does not create a prima facie civil cause of action and the burden of proof always remains with plaintiff.").

statements from the district court's opinion, including the statement that the court found opinions from two other circuits "unpersuasive," and by snatching phrases from this Court's opinions. Examination of the cases, however, shows that petitioners compare cases which are not in conflict, but which merely describe the burden of proof or production at different stages of the trial process.

The district court below imposed on defendants the burden of production to show that the search was the result of voluntary consent. Only if they met that burden did petitioners' ultimate burden or risk of non-persuasion on the elements of the cause of action come into play. Only the district court and the Court of Appeals for the Second Circuit in Ruggiero v. Krzeminski, 928 F.2d 558 (2d Cir. 1991), have explored the burden of proof analysis through this last step, and they are consistent. In Ruggiero, the Second Circuit held:

> It is true that searches and seizures conducted without warrants are presumptively unreasonable. The operation of this presumption, contrary to the Ruggieros' contention, cannot serve to place on the defendant the burden of proving that the official action was reasonable. Rather, the presumption may cast upon the defendant the duty of producing evidence of consent or search incident to an arrest or other exceptions to the warrant requirement. However, the ultimate risk of nonpersuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials.

Id. at 563 (citations omitted).

The cases cited by petitioners as being in conflict with the district court make passing reference to the acknowledged burden of defendants to prove voluntary consent. As discussed below, however, these cases, unlike Ruggiero, do not address the next and final step in the burden of proof analysis, which is triggered only if defendants prove voluntary consent.

1. Karnes v. Skrutski, 62 F.3d 485 (3d Cir. 1995).

   Here, the Third Circuit reviewed the lower court's grant of defendants' motion for judgment as a matter of law. The standards for a motion for a judgment as a matter of law are, of course, identical to the summary judgment standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). This case is irrelevant, however, because it concerned only the issue of qualified immunity, and defendants clearly bear the burden of proof in raising this defense.

2. McGann v. N.E. Ill. Regional Commuter R.R., 8 F.3d 1174 (7th Cir. 1993).

   In reversing the lower court's grant of summary judgment to the commuter railroad company and several police officers, the Seventh Circuit held that, "under the totality of the circumstances," defendants did not meet their "burden of showing" that plaintiffs consented to being searched. Id. at 1186. Without such a showing, defendants did not meet their burden of producing evidence establishing the voluntary consent exception to the warrant requirement. Because the defendants failed to carry their burden of production, it was unnecessary for the court to address the plaintiff's ultimate burden of non-persuasion.

3. Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), cert. denied, 470 U.S. 1051 (1985).

This case was not resolved on the basis of consent. Instead, the court found that school officials' actions were reasonable under a line of cases addressing searches in a public school context. The court stated in dicta, however, that "[t]he burden would be upon defendants to demonstrate such a voluntary relinquishment of constitutional rights by plaintiff." Id. at 980. That statement is not contrary to the district court's opinion below. As in McGann, the Sixth Circuit does not analyze the allocation of the burdens of proof through the final step. Instead, the Sixth Circuit simply found that defendants' evidence of consent - i.e. the student/plaintiff's acquiescence in a pat-down search - was not sufficient "to demonstrate" - i.e. meet the burden of production - that the student's consent was voluntary.

4. DePugh v. Smith, 880 F.Supp. 651 (N.D. Iowa 1995).

This case addresses the issue of third party consent and is entirely in line with the district court's opinion below. Defendant police officers moved for summary judgment on plaintiff's illegal search claim "because either the affected party or someone with common authority over the property has consented to a search of that property." Id. at 662. While defendants did come forward with some evidence of consent, that evidence was not enough to require granting of their motion for summary judgment because "defendants have failed to demonstrate that it is beyond dispute that Mayor Swenson, even if he had sufficient authority, consented

to each of the three searches they conducted." Id. at 664. This is the court's only allusion to defendants' burden of production and the court refers only to the summary judgment burden of persuasion.

5. Huotari v. Vanderport, 380 F.Supp. 645 (D.Minn. 1974).

The district court here relied on criminal cases when ruling that "defendants' reliance on the defense of consent to validate the search places upon them the burden of proving that consent was, in fact, `freely and voluntarily given.'" Id. at 648. The court found that defendant police officers failed to meet this burden because "there is inadequate evidence from which to find a giving of consent." Id. Accordingly, the court simply found that defendants did not meet their burden of production and, as with the other cases, it was not necessary to consider the ultimate burden of persuasion.

All five of the foregoing cases agree with the district court below that police officers in § 1983 actions have the burden of production on the issue of voluntary consent. Because the officers were unable to meet that burden in the other cases, or the issue was not material, the cases ended at that point and did not reach the final analysis. The district court here should not be faulted for a clear statement of the entire analysis even though it was unnecessary to its summary judgment decision. Its position, affirmed by the court of appeals, is not in conflict with other circuits.

- C -

Even if the district court's burden of proof analysis conflicts with other circuits, its comments were dicta and not necessary to the decision.

Respondents believe that the circuits are in harmony but, if the district court below is in conflict, this is the wrong case to reconcile the split.

This case was resolved on motion for summary judgment. The district judge examined all the facts deemed pertinent by plaintiffs/petitioners and, following the holding of Schneckloth v. Bustamonte, supra, examined the totality of the circumstances. The judge then concluded that no evidence existed in the record which could support a verdict for plaintiffs. Amato, 875 F.Supp. at 1139; (Pet. App. A 33) ("The question remains then whether the record, construed in plaintiffs' favor, permits a reasonable jury to conclude that Scott's consent was coerced. It does not.") Whether plaintiffs had the ultimate burden of proving an illegal search was immaterial because the record, even when read in a light most favorable to them, would not support a judgment for them under any circumstances. The district court's conclusion was not dependant upon whether a particular party could carry the ultimate burden of persuasion, but upon whether there was any evidence in the record to support a verdict for plaintiffs. There was none.

The district court's conclusion on the voluntary consent issue makes clear that petitioners' ultimate burden of persuasion played no role in its consideration of respondents'

motion for summary judgment.[7] Nowhere in the district court's review of the record and analysis of the "voluntariness" issue, Amato, 875 F.Supp. at 1134-39; (Pet. App. A22-A33), does the district court mention the burden of persuasion. When the district court actually reviewed the facts in the record, however, the court expressly mentions the guiding summary judgment standards six times[8] and the totality of the circumstances standard ten times, but does not mention the preponderance of the evidence standard. The ultimate burden of persuasion standard was, quite simply, unimportant to the district court's totality of the circumstances review of the record and ruling on respondents' motion for summary

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[7]See 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3], at 56-267-268 (1995-96) ("On motion for summary judgment by a defendant on the ground that plaintiff has no valid claim, the defendant, as the moving party, has the burden of affirmatively demonstrating that the plaintiff cannot prevail as a matter of law. This is true because the burden to show that there is no genuine issue of material fact rests on the party moving for summary judgment, whether he or his opponent would at trial have the burden of proof on the issue concerned."); 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2727(1983) ("[T]he movant carries the burden of persuading the court that his statement of the facts is accurate."). The district court faithfully followed these principles.

[8]The court introduces its review of the record by noting that

> [t]he issue before the court on this motion for summary judgment, therefore, is whether the evidence could permit reasonable jurors to conclude that the entry into Scott's house was made without Scott's voluntarily given consent. The acts that plaintiffs contend are pertinent to this issue, taken as true and allowing all permissible inferences therefrom, are:

Amato, 875 F.Supp. at 1135; (Pet. App. A24).

judgment on the voluntary consent issue. Thus, it was the absence of evidence that was fatal to petitioners, not the allocation of the ultimate burden of proof.

- II -

Because petitioners fail to challenge the district court's independent basis of decision on their illegal search claims, their petition seeks an advisory opinion.

Even assuming that the district court improperly allocated the burden of proof on the voluntary consent issue and this allocation somehow carries any import, this error was harmless because the district court also ruled that respondents were entitled to qualified immunity from petitioners' illegal search claims. Amato, 875 F.Supp. at 1139-43; (Pet. App. A33-A41). Petitioners do not challenge that ruling. Accordingly, a ruling by this Court on the voluntary consent burden of proof issue would be purely advisory because petitioners did not challenge this alternative, independent basis for granting respondents' motion for summary judgment on the illegal search claim.

This Court has long recognized that its "power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 126 (1945); see also Preiser v. Newkirk, 422 U.S. 395, 401(1975) ("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy" and "a federal court [lacks] the power to render advisory opinions."). Even assuming that this Court granted certiorari and reversed the district court's ruling on the allocation of the burdens of proof on the voluntary consent issue, such a ruling would not affect the district court's

independent ruling that respondents were entitled to qualified immunity from petitioners' federal claims. Therefore, the effect of a ruling on the burden of proof issue would be purely advisory.

The paucity of guidance from this Court for situations such as this is not surprising, but lower courts have confronted the issue. In In re Public Service Co. of N.H., 879 F.2d 987, 989-90 (1st Cir. 1989), the court, in a per curiam opinion, held that the lower court properly dismissed an appeal where appellant appealed from only one of the separate grounds supporting the judgment at issue. Indeed, the court of appeals there noted that "these principles of law are well known, to the point where the appeal is close to frivolous." 879 F.2d at 990.

Because petitioners' first question seeks review only of the district court's ruling on the burden of proof, and not on qualified immunity, a ruling by this Court on the former would be advisory. Accordingly, for this reason alone, this Court should decline review of petitioners' first question presented.

- III -

The question of whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes is a proper issue for consideration on a motion for summary judgment.

Petitioners' second question deserves little discussion. Petitioners claim that the district court erred in granting summary judgment to respondents on Amato's unlawful arrest claim. They argue that, under this Court's opinion in Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989), the question whether a private party should be deemed an agent or

instrumentality of the government for Fourth Amendment purposes is "a factual question inappropriate for resolution on a motion for summary judgment." (Pet. i).

A close reading of petitioners' argument on this point reveals that petitioners do not really question whether summary judgment is a proper vehicle for resolving the agency question. Instead, petitioners actually seek to have this Court make a third review of the record to see if it can find what two previous courts have been unable to find - proof that the complainant was acting at the police officer's behest when he swore out the warrant against Amato. Yet, petitioners were apparently mindful that "[a] court of law, such as this Court is, rather than a court for correction of errors of fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Exxon Co. v. Sofec, Inc., -- U.S. -- , 116 S.Ct. 1813, 1820 (1996) (quoting Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949)). Hence, petitioners style their second question as a non fact-bound, legal issue.

The Court need look no further than to Skinner, the decision upon which petitioners rely, to reject petitioners' argument. Skinner concerned the propriety of drug and alcohol testing of railroad workers by railroad companies and was resolved in a motion for summary judgment. As an initial matter, this Court considered defendants' position that the tests were "primarily the result of private initiative" and, therefore, did not implicate the Fourth Amendment. Skinner, 489 U.S. at 615. The Court noted that the issue of "[w]hether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private

party's activities, a question that can only be resolved 'in light of all the circumstances.'" Id. at 614 (citations omitted). Based on the summary judgment record, the Court found that "the Government's encouragement, endorsement, and participation" in the drug and alcohol testing served to "implicate the Fourth Amendment." Id. at 615-16. Therefore Skinner demonstrates that where material facts are not in genuine dispute, summary judgment is an appropriate vehicle for resolving the agency question.

Petitioners cannot, and indeed do not, attempt to support the legal position raised in their second question presented. Instead, as noted above, petitioners merely argue their factual allegations on this issue a third time. Respondents need not attempt to rebut these allegations yet again. The district court,[9] after thoroughly reviewing the record and applying the proper summary judgment standards, found that "the evidence in this record does not constitute the deliberate supplying of misleading information. . . . Indeed, it was Acola's conduct, not Hosick's, which produced the trespass charge. There is no evidence that Acola was acting at Hosick's

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[9]Petitioners' shameless ad hominem attack on the district court judge (Pet. 27-30) was not made in the court of appeals and, therefore, was waived. (Pet. App. A67-A129, A130-A149); see United States v. Alvarez-Sanchez, -- U.S. --, 114 S.Ct. 1599, 1605 n.5 (1994). Moreover, the facts are insufficient to require disqualification. The inchoate interest the district court judge shared with certain members of the trial lawyers' firm, not including trial counsel, involved no ability to participate in management of the buildings and was not related to this litigation. Lacking any reasonable doubt about the judge's own impartiality, disqualification was not required. In re Beard, 811 F.2d 818, 831 (4th Cir. 1987) (district court judge's passive investment, with local counsel, in office building unrelated to case created no reasonable doubt about judge's impartiality).

behest." Amato, 875 F.Supp. at 1148; (Pet. App. A52). The court of appeals "reviewed the district court's opinion, the record, the briefs, and the contentions advanced at oral argument by both parties and [found] no reversible error." (Pet. App. A3). Accordingly, this court should not review the district court's grant of respondents' motion for summary judgment on Amato's unlawful arrest claim relating to the trespass charge.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

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